

LORD JERVISWOODE—I am very sensible of the importance of this case, and also of the perspicuity of the observations which have fallen from the Lord Justice-Clerk and Lord Ardmillar, but after careful consideration of the circumstances I am clearly of the same opinion as the Lord President and the majority of your Lordships.

The Court adhered to the interlocutor of the Lord Ordinary, with expenses.

Counsel for Col. M'Donald (Reclaimer)—Fraser and Moncrieff. Agents—H. G. & S. Dickson, W.S.

Counsel for John Allan M'Donald—Watson and Trayner. Agents—Dewar & Deas, W.S.

Counsel for Misses M'Donald—Clark, Q.C., and Balfour. Agents—Webster & Will, S.S.C.

Counsel for A. B. M'Grigor and Pursuers—Millar, Q.C., and Marshall. Agent—A. J. Napier, W.S.

Saturday, February 28.

SECOND DIVISION.

[Lord Ormidale, Ordinary.]

CAMERON'S TRUSTEES *v.* GOW AND OTHERS.

Succession—Testament—Preference—Specific Legacy—General Bequest.

A testatrix having left by will and codicils thereto sums amounting to more than the estate when realised, a question as to abatement arose among the beneficiaries. The trustees thereupon raised a multipointing to have it decided. Held that certain legacies being specific were preferential, and that all the others must suffer proportional abatement.

Observed, p. Lord Justice-Clerk—That a condition of legacy was not preferable, and that there was nothing more here.

This was a reclaiming note against an interlocutor pronounced by Lord Ormidale on 22d November 1873, in an action of multipointing and exoneration at the instance of the only accepting and acting trustees under the will of the late Margaret Cameron, pursuers and real raisers, against the children of Benjamin Gow and others, beneficiaries under the will. The purposes of the trust were—(1) For payment of the truster's debts, deathbed and funeral expenses, and the expense of executing the trust; (2) For payment of any legacies which she might thereafter bequeath by any writing under her hand; (3) To deliver to her sister the whole furniture belonging to her at the time of her death; (4) To convey to her sister all her estate, heritable and moveable, so far as existing in kind, which belonged to her father, and to which the truster succeeded at his death; (5) To pay to her sister the difference between the actual value of the said estate bequeathed in the fourth place and the sum of £3000, at which sum, for the purposes of her deed of settlement, the truster estimated the value of the share of her father's estate to which she succeeded; (6) To pay and convey to her sister all her estate, heritable and moveable, so far as existing in kind, which belonged to her sister, Marianne Cameron, and to which the truster succeeded on the death of her sister Marianne; (7) To pay to her sister Elizabeth the difference between the actual value of the said

estate bequeathed in the sixth place and the sum of £8800, at which sum, for the purposes of her deed of settlement, the truster estimated the value of the share of her said sister Marianne's estate, to which she succeeded. And it was thereby provided that in the event of the truster conveying to her sister Elizabeth, during her life, any portion of the estate to which she had succeeded at the death of her father or sister Marianne, the value thereof, as fixed by any writing under her hand, and failing that, by her trustees, should be applied *pro tanto* in extinction of the provisions in favour of her said sister in the fifth and seventh places; (8) To hold the whole residue and remainder of the truster's means and estate in trust, for the purposes and for behoof of the persons whom she might appoint by any writing under her hand, and failing such appointment, for behoof of her sister Elizabeth Cameron. By the deed the truster also appointed her trustees her executors.

By codicil, executed by the truster on 30th January 1869, she directed her trustees—(1) To set apart and invest, and hold and administer the sum of £5000, for the life of the alimentary use alienarily of Benjamin Gow, residing in St George's Road, Glasgow, and Margaret Taylor or Gow, his wife, and the survivor of them during all the days of their lives, and to pay over to them and the survivor the free annual income and revenue thereof; and on the death of the survivor of the said Benjamin Gow and Margaret Taylor, the truster directed her trustees to pay over and divide the said sum of £5000 equally among their surviving children, and the issue *per stirpes* of such of them as might have predeceased. (2) To set apart and invest, and hold and administer the sum of £1000 for the life of the alimentary use alienarily of the said Mrs Jane Scott or M'Kechnie, wife of the said Robert M'Kechnie, and to pay over to her the income thereof, and upon her death to divide the said sum equally between and among the lawful children of the said Jane Scott or M'Kechnie who might survive, and the issue *per stirpes* of such of them as might have predeceased. (3) She bequeathed to each of her trustees who should accept and act until the winding up of the trust, or until his or her death, the sum of £50. (4) She directed her trustees to make payment, at the first term of Whitsunday or Martinmas after her death, of a number of legacies, free of legacy duty.

On 27th October Miss Cameron executed another codicil, which, in the fourth place, provided as follows:—"Considering that I made the provisions contained in my codicil of 30th January 1869 in favour of Benjamin Gow, my nephew, and his family, in the knowledge that my sister Elizabeth had not by her deed of settlement left anything to him, and with the view of compensating him in part; and further, considering that the said Benjamin Gow has shewn me and my said sister considerable kindness, and that I wish to put him and his family in at least as good a position as if my said sister had by her deed of settlement provided for him as I would have liked her to have done; therefore, in the first place, I leave and bequeath to the said Benjamin Gow, and in the event of his predeceasing me, his eldest son alive, but only in the event of my said sister Elizabeth not being of sound mind at the time of my death, the household furniture, silver plate, pictures, and other household plenishing of every kind belonging to me at the

time of my death; and, in the second place, I leave and bequeath to the said Benjamin Gow and his wife and family, to be held by my trustees on the same trusts as the £5000 mentioned in my said codicil of 30th January 1869, the further sum of £5000; and I provide and declare that in the event of my trustees not having sufficient funds to pay said sum without touching the share of my said estate and effects directed to be held for my said sister Elizabeth, my said trustees shall, as from the date of my death, hold for behoof of the said Benjamin Gow and his wife and family, as before mentioned, such sum as may remain, without trenching on my said sister's share of my estate and effects, and shall, upon the death of my said sister, if the share of my estates held for her behoof is then vested in them, but not otherwise, hold a further sum, consisting of the balance of the said sum of £5000, and a share of the accumulated profits thereof proportioned thereto, for behoof of the said Benjamin Gow and his wife and family, as before mentioned; and I provide and declare that the legacy of £5000 in favour of the said Benjamin Gow and his family, left and bequeathed by the said codicil, dated 30th January 1869, and the legacy left and bequeathed to them by this codicil, are left and bequeathed by me on the express condition that the said Benjamin Gow and his wife and children, or such of them as are alive at my death, and the heirs, executors, and assignees of any predeceassors, shall ratify and confirm and hold as effectual the deed of settlement of my said sister, dated 8th December 1868, and codicil dated 30th January 1869, and shall obtain the ratification thereof by all other parties who could challenge the same on any ground whatever, unless my said sister Elizabeth, in the knowledge of this codicil, and while in a fit state of mind to make a will, shall revoke said deed of settlement and codicil, and make a new will; and I provide and declare that, in the event of no ratification as aforesaid being obtained within two years after my death, the legacies left and bequeathed by me by this codicil, and by my said codicil of 30th January 1869, for behoof of the said Benjamin Gow and his wife and family, shall be held as revoked, and the amount or proceeds thereof shall be divided among the beneficiaries under my deed of settlement and my codicils thereto, excluding the said Benjamin Gow and his wife and children, according to the sums respectively bequeathed to them; and, in the fifth and last place, I direct my trustees, in the event of my said sister Elizabeth surviving me, to pay and divide the residue of my estates, if any, equally between and among the parties who would have been entitled to the residue of my estates had my said sister Elizabeth predeceased me; and, so far as not hereby altered or revoked, I do hereby ratify and approve the fore-said deed of settlement and codicil in the whole clauses, tenor, and contents thereof."

The truster died on 11th June 1871, and the trust-funds have been realised to the extent of £17,677, 5s. 3d., and there are certain subjects also not yet realised. The claims of the children of Benjamin Gow, four in number, were as follows:—

"I. The claimants claim to be ranked and preferred *primo loco* on the fund *in medio*—

"First, For the sum of £5000, directed by the truster, in the codicil executed by her dated 30th January 1869, to be set apart, invested,

held, and administered for the life interest alimentary use of Benjamin Gow and Margaret Taylor or Gow his wife, and on the death of the survivor of them to be paid over and divided equally among their surviving children, and the issue *per stirpes* of such of them as might have predeceased, with interest at five per cent. per annum since the truster's death till paid.

"Second, For the sum of £5000, left and bequeathed by the truster in the codicil dated 27th October 1869, to the said Benjamin Gow and his wife and their family, to be held by her trustees on the same trusts as the said sum of £5000 mentioned in her codicil of 30th January 1869, with interest on this additional sum at the said rate since the truster's death till paid.

"II. The claimant William Cochrane Gow claims to be ranked and preferred for the household furniture, silver plate, pictures, and other penishing which belonged to the truster at her death."

Mrs M'Kechnie and the other legatees claimed under the codicil of 30th January 1869.

Lastly, the trustees of Miss Cameron and the *curator bonis* to Elizabeth Cameron, sister of the truster, and now insane, claimed that the trustees be found bound "(1) To hold the estate and effects bequeathed to Elizabeth Cameron by the said deed of settlement in trust until she becomes fit to manage her own affairs, if such event shall happen, and then pay the same, and any produce or profits which may have accrued, to the said Elizabeth Cameron, or to hold the same in trust until her death, should she not regain sufficient soundness of mind to manage her own affairs; and (2) to pay to the said Elizabeth Cameron, or to her curator, for her behoof, while said estate and effects are held in trust by them, such portion of the income or capital as the said trustees may think expedient."

The first set of claimants, the Gows, pleaded—
 "(1) According to the sound construction of the direction in the codicil, dated 30th January 1869, to set apart and invest, hold, and administer, the sum of £5000 for the life interest alimentary use of Benjamin Gow and his wife, and the survivor of them, and to pay over and divide this sum upon the death of the survivor equally among his children, the claimants are entitled to have the said sum paid over to them, with interest as claimed, whether there are sufficient funds for payment of the legacies specified under the third and fourth heads of the purposes in this codicil or not. (2) According to the sound construction of the additional provision of £5000 in the codicil of 27th October 1869, for Benjamin Gow and his wife and family, to be held on the same trusts as the prior provision, the claimants are entitled to have this sum, and the interest accrued on it, also paid to them, preferably to the claims of the other beneficiaries for their legacies. (3) In any event, the claimants are entitled to have the deficiency, in payment of the last-mentioned sum and interest, made up to them at the death of Elizabeth Cameron out of the share of the estate and effects directed to be held for her, or otherwise out of the fund *in medio* generally. (4) The claimant William Cochrane Gow is entitled to have the household furniture and the other effects specifically bequeathed delivered to him, or if these

effects have been sold, as now alleged, he is entitled to the price obtained therefor as a *surrogatum* for the articles. (5) Generally, in the circumstances condescended on, the claimants are entitled to be ranked and preferred on the fund *in medio* as claimed by them."

The second set of claimants pleaded that they were entitled to be ranked and preferred on the fund *in medio* according to the legacies provided to them by the first codicil.

The third set of claimants pleaded their right to decree in terms of their claim.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh 22d November 1873.*—The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings: Finds that all the parties in this case concurred in stating that, as there would be a deficiency of funds to pay or satisfy in full all the bequests in the trust-disposition and settlement, and the two codicils, founded on in the record, it had become necessary to have the questions of preference referred to in the following findings determined by the Court: Finds (1) that the bequest of household furniture, silver plate, pictures, and other household plenishing, contained in the second of said two codicils, is of the nature of a specific legacy, and as such must be satisfied preferably to the general legacies or bequests, and is not liable to abatement along and *pro rata* with them; (2) Finds that the bequests to the testatrix's sister Elizabeth, being those left in the fourth and sixth places by the trust-disposition and settlement in question, are also of the nature of specific legacies, and must be paid or satisfied preferably to the general legacies or bequests of the testatrix, and are not liable to abatement along and *pro rata* with them; (3) Finds that any abatement arising from a deficiency of funds that it may be necessary to make, in terms of the 4th or next finding in this interlocutor, from the general legacies or bequests of the testatrix, must, in so far as it may affect the share of the testatrix's estate and effects directed to be held for her sister Elizabeth, be taken and made up from 'the further sum of £5000' left by the testatrix to Benjamin Gow, his wife and family, as referred to 'in the second place' in the second of the foresaid two codicils; and (4), Finds in reference to all the bequests of the testatrix, so far as not disposed of by the preceding findings, that they are of the nature of general legacies, having no priority or preference, and are therefore liable, in the event of there being a deficiency of trust-estate or funds to pay and satisfy them in full, to suffer abatement *pro rata* and in proportion to their respective amounts, the abatement applicable to the share falling to the testatrix's sister Elizabeth falling to be made up as aforesaid from or sustained by the second £5000 left to the Gows: With these findings, and under a reservation in the meantime of all questions of expenses, appoints the cause to be enrolled, in order that it may be further proceeded with.

"*Note*—All the parties concurred in stating that there would be a deficiency of trust-estate or funds to pay or satisfy the testatrix's bequests, after discharging her debts and the expenses of administration; and they also all concurred in moving the Lord Ordinary to determine by findings, as he has now done, the questions referred to in the preceding interlocutor, on the case as it now stood, without further procedure. The Lord Ordinary had

the less objection to giving effect to this motion inasmuch as it was stated that, on the questions referred to being determined by him, the parties would probably be able to arrange amongst themselves as to how the case should be otherwise disposed of.

"1. As all the parties were agreed in the view taken by the Lord Ordinary in regard to the bequests referred to in the first finding of his interlocutor, it is unnecessary to add anything in relation to that matter.

"2. The Lord Ordinary also understood it to be assented to by all parties, except the Gows, whose contention will be immediately noticed, that the second of the Lord Ordinary's findings was correct; and, at any rate, he does not see how any well founded objection can be taken to it.

"3 and 4. These findings were objected to by the Gows on various grounds. The first and chief grounds of their objection was, that as the condition upon which the two bequests of £5000, and especially the second of the two, were left to them by the testatrix, has been satisfied by the deed of ratification, No. 20 of process, they must be held, in the phraseology of the English law, to have been purchased by them, and therefore that they must be paid or satisfied preferably to all the general legacies or bequests. The Lord Ordinary was not referred to any Scotch authority or precedent in support of this proposition; and he is aware of none. Neither does he think that the English authorities and precedents which were referred to, are applicable to the circumstances of the present case. According to these authorities and precedents it appears that to entitle a legatee to claim a preference on the ground in question he must show that there has been something of the nature of a contract betwixt him and the testator existing at the death of the latter, whereby he has given a valuable consideration for his legacy. But here, in the opinion of the Lord Ordinary, there is no room for holding that there was any such contract. Not only did no such contract exist at the death of the testatrix, but there is no evidence at all of a valuable consideration having at any time, or in any way, been given by the Gows for their legacy. There is not even any evidence of their having had a well founded right to challenge the settlement of the testatrix's sister Elizabeth. The objection of the Gows, viewing it according to the English authorities cited in the argument, appears therefore to the Lord Ordinary to fall under the principle of decision in the case of *Davis v. Bush*, 10th June 1831 (*Young's Reports*, p. 341), where Lord Lyndhurst held that there was no purchase of a legacy, and that the legacy there in dispute was not entitled to any preference.

"It was also argued for the Gows that their two bequests of £5000 must, independently of the principle just referred to, have been intended by the testatrix, from the terms in which they have been left by her, to be preferred to her general legacies; but the Lord Ordinary has been unable to discover any sufficient ground for this contention.

"The Lord Ordinary has only further to explain that he understood it to be argued by the curator to Miss Elizabeth Cameron that she was entitled to be preferred not only in a question with the Gows, but also as against all the general legatees.

"The Lord Ordinary does not see any sufficient reason for holding this to be the case; and further,

Miss Cameron or her curator do not appear to have any interest in desiring that it should be so held, seeing that their claim would be amply secured as against the Gows' legacies."

Against this interlocutor the claimants William Cochrane Gow and others reclaimed.

At advising—

LORD JUSTICE-CLERK—My Lords, on the first two points contained in the Lord Ordinary's interlocutor I concur with the findings of his Lordship, but I do not feel disposed to concur in the third and fourth findings. These are as follows:—“(3) Finds that any abatement arising from a deficiency of funds that it may be necessary to make, in terms of the 4th or next finding in this interlocutor, from the general legacies or bequests of the testatrix, must, in so far as it may affect the share of the testatrix's estate and effects directed to be held for her sister Elizabeth, be taken and made up from 'the further sum of £5000' left by the testatrix to Benjamin Gow, his wife and family, as referred to 'in the second place' in the second of the foresaid two codicils; and (4), Finds in reference to all the bequests of the testatrix, so far as not disposed of by the preceding findings, that they are of the nature of general legacies, having no priority or preference, and are therefore liable, in the event of there being a deficiency of trust estate or funds to pay and satisfy them in full, to suffer abatement *pro rata*, and in proportion to their respective amount, the abatement applicable to the share falling to the testatrix's sister Elizabeth falling to be made up as aforesaid from or sustained by the second £5000 left to the Gows.” The result there arrived at, I think, is not quite a sound one. What I regard as the reading of the codicil is, that the £5000 left to the Gows is not to diminish the share otherwise appointed. A condition of legacy is not preferable, and all that is here is merely a condition. The true construction of this will and the codicils is based upon the ascertainment of what Elizabeth would have got in the existing state of the funds if the £5000 had not gone to the Gows.

LORD BENHOLME—I quite agree with your Lordship's observations as to the slight modification which it is advisable we should make on the Lord Ordinary's interlocutor.

If this modification is not made Elizabeth takes a benefit—actually takes a benefit from the £5000 having been granted to the Gows. Under the Lord Ordinary's interlocutor, by the granting of the second legacy she draws back from the Gows not only the difference between the two legacies but also the loss she would have suffered by abatement. That is, she would be better by the granting of the second legacy than if it had never been granted at all.

LORD NEAVES—I am of the same opinion, and think that all must suffer a proportional abatement. The granting of the second legacy was to remedy a supposed injustice done in the will of Elizabeth herself. I think that the Lord Ordinary has rather overlooked that.

Counsel for the Gows—Geo. Webster and Balfour. Agent—C. S. Taylor, S.S.C.

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Counsel for Trustees and the *Curator Bonis* to Elizabeth Cameron—Watson and Pearson. Agents—Webster & Will, S.S.C.

Saturday, February 28.

SECOND DIVISION.

SPECIAL CASE—THE SCHOOL BOARD OF PEEBLES.

Education Act, 1872—School Board—Burgh School—Parish.

Two schools in a burgh (part of a parish having also a landward district) were supported out of the common good. Under sec. 11 of the Education Act the Board of Education ordered that for the purposes of that Act the burgh should be deemed a part of the parish; and, a School Board having been elected for the parish,—*held*—(1) that by the Act the two schools in question were vested in the Board; and (2) that the Magistrates were bound to contribute towards their support out of the common good the same annual sum they had been in use to do.

This was a Special Case, in which the School Board of the parish of Peebles were parties of the first part, and the Magistrates and Town Council of that royal burgh were the parties of the second part. At the date of the passing of the Education (Scotland) Act, 1872, on the 6th of August of that year there were situated within the royal burgh of Peebles two schools, one of which was termed the Burgh Grammar School, and the other the Burgh English School. Both of these Schools were then, and had been from time immemorial, burgh Schools, under the exclusive control and management of the Magistrates and Council of the burgh, and had been erected and maintained by them out of the common good. Until the passing of the Act it was the custom of the burgh to make contributions to the burgh schools out of the common good, and the sum paid was £100 annually, of which one moiety was paid to the teacher of each school in name of salary. The other emoluments of the teacher of the English school consisted of school fees and parliamentary grant; and of the grammar school of fees only.

The parish of Peebles contains within its limits not only the burgh, but also a considerable landward district. No parochial school was ever established in the parish under the Act 1696, entitled “Act for Settling Schools,” or of any of the subsequent statutes, viz., 43 Geo. III., c. 54, 1st and 2d Vict., c. 87, and 24 and 25 Vict., c. 107. And accordingly no assessment for support of parish schools or schoolmasters was ever laid upon the heritors of the landward district of the parish, and they had no concern with the burgh schools. Shortly after the passing of the Education Act, the Board of Education for Scotland, established by that Act, in virtue of the powers conferred on them by the 11th section, ordered that the burgh of Peebles should be dealt with under the Act, and for the purposes thereof, as part of the parish of Peebles. Therefore, in terms of the 8th and 12th sections of the Act, a School Board was elected for the parish of Peebles, including the burgh, and under the provisions of the Act, and particularly

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